UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WILLIAM GARSIDE, JR.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 96-156-B-C***
	)	
BILL MARTIN CHEVROLET, INC., et al.,	***)***	
	)	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR ATTORNEY FEES AND COSTS

The defendants, in whose favor summary judgment was entered on all claims in this action on April 2, 1997 (Docket No. 21), now move pursuant to Fed. R. Civ. P. 54(d)(2), 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 12117(a) for an award of attorney fees and costs. I recommend that the court deny the motion[1] for attorney fees and that costs be allowed by the clerk pursuant to Rule 54(d)(1).

The plaintiff's claims were based on the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* The ADA provides, at 42 U.S.C. § 12117(a), that "[t]he powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall

[1] The plaintiff has filed a Motion to Deny (Docket No. 26) the defendants' motion for attorney fees and costs in addition to his opposition to that motion (Docket No. 25). The motion essentially duplicates the points made in the memorandum in opposition and is an unnecessary exercise. For this reason, without addressing the merits, I recommend that the Motion to Deny be denied.

be the powers, remedies, and procedures this subchapter provides to . . . any person alleging discrimination on the basis of disability . . . concerning employment." With regard to the availability of attorney fees, section 2000e-5(k) provides: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs."

The Supreme Court provided the definitive interpretation of section 2000e-5(k) in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). The Court held that the considerations applicable to a request for attorney fees by a prevailing defendant differ significantly from those applicable to such a request from a prevailing plaintiff.

> [A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.
>
> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. . . .
>
> Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.

434 U.S. at 421-22.

In the First Circuit, "the standard under which prevailing defendants in civil rights cases may become entitled to fees is, and should remain, difficult to meet." *Foster v. Mydas Assoc., Inc.*, 943 F.2d 139, 145 (1st Cir. 1991). Fee-shifting in favor of a prevailing defendant is the exception, not the rule. *Casa Marie Hogar Geriatrico, Inc. v. Rivera-Santos*, 38 F.3d 615, 618 (1st Cir. 1994). A

court may not award attorney fees solely because the plaintiff did not prevail. *Marquart v. Lodge 837*, 26 F.3d 842, 849 (8th Cir. 1994). If the plaintiff had "some basis" for his discrimination claim, the prevailing defendant may not recover attorney fees. *Id*. (citation omitted). The Sixth Circuit allows such a recovery only in "the most egregious circumstances." *Noyes v. Channel Prod., Inc.*, 935 F.2d 806, 810 (6th Cir. 1991) (citation omitted).

The defendants do not argue that the plaintiff in this action proceeded in bad faith. They base their argument that the action meets the *Christiansburg* standard on the facts that (1) the plaintiff allegedly knew that the position for which he applied in 1993 had been eliminated in 1992; (2) the Maine Human Rights Commission had rejected the claim raised in his complaint; (3) the complaint added defendants and claims not before the Commission; (4) all claims in the complaint were barred by the applicable statute of limitations; and (5) the complaint raised a claim under the Rehabilitation Act, 29 U.S.C. § 794a *et seq*., which was later withdrawn.

There is nothing frivolous, unreasonable or without foundation in withdrawing a claim after raising it in a complaint; indeed, it is not clear from the record in this action that the plaintiff ever intended to actually raise a separate Rehabilitation Act claim. Similarly, the *Christiansburg* standard is not implicated because defendants or claims were added after the plaintiff had pursued his claim before the Maine Human Rights Commission. The summary judgment in favor of the defendants in this action was not based on the defendant's statute of limitations argument, Recommended Decision (Docket No. 17) and Order Affirming Recommended Decision (Docket No. 20), so that argument cannot provide a basis for finding the action to be without foundation. Even if the plaintiff knew that the position he sought had been eliminated before he applied, and that the ADA was not in effect at the time of the elimination, he attempted to show a continuing violation including earlier

acts, a legitimate means of proceeding under the ADA, albeit not successful in this case. The plaintiff also argued that he need not show that a position was available under his legal theory. This legal theory was incorrect. While summary judgment was granted based on the fact that the position was unavailable at the time of application, I cannot conclude on this basis that the claim was "frivolous" when it was originally raised. *Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179, 1192 (1st Cir. 1996).

The remaining argument is based on the assertion that the Maine Human Rights Commission denied the plaintiff's discrimination claim arising out of the failure to hire him for the same reason upon which this court based its entry of summary judgment. Of course, the fact that an administrative agency has dismissed the charge made in a subsequent lawsuit does not mean that the lawsuit was necessarily frivolous from the outset. *Eichman v. Linden & Sons, Inc.*, 752 F.2d 1246, 1249 (7th Cir. 1985).

I have carefully reviewed the Investigator's Report concerning the plaintiff's charges before the Commission, which were more extensive than the claims raised in his complaint filed with this court. Exh. B to Affidavit of Lawrence C. Winger (attached to Motion for Attorney's Fees and Costs, Docket No. 23). While that decision did put the plaintiff on notice that the lack of an available position when he applied for re-employment was a fatal defect in his claim, his claim before this court was cast in different terms, contending as a matter of law that he need not show that a position was available. While this inventive approach was unsuccessful and perhaps not very likely to succeed, the complaint was not therefore frivolous or without foundation. This action did not involve the kind of fabrication of testimony and evidence that has been found to justify the award of attorney fees under *Christiansburg. E.g., Sayers v. Stewart Sleep Ctr., Inc.*, 932 F. Supp. 1415,

1418-19 (M.D. Fla. 1996); *Daramola v. Westinghouse Elec. Corp.*, 872 F. Supp. 1418, 1420 (W.D. Pa. 1995). The kind of egregious circumstances that would allow the award of attorney fees to the defendant are not present here.

For the foregoing reasons, I recommend that the defendants' motion for attorney fees and costs be **DENIED** as to attorney fees and that costs be assessed by the clerk in accordance with Fed. R. Civ. P. 54(d)(1).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 9th day of June, 1997.

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David M. Cohen
United States Magistrate Judge